

**DEPARTMENT OF JUSTICE PROPOSAL
RESPONDING TO THE EXECUTIVE MEMORANDUM ON FAIRNESS IN LAW ENFORCEMENT**

I. Purpose

To respond to the Executive Memorandum on Fairness in Law Enforcement.

II. Background

On June 9, 1999, President Clinton issued an executive memorandum to the Secretary of the Interior, the Attorney General, and the Secretary of the Treasury directing them "to design and implement a system to collect and report statistics relating to race, ethnicity, and gender for law enforcement activities in each department." The Departments were required to submit their data collection proposals by October 9, 1999.

The executive memorandum requires each of the agencies within the respective Departments to improve data collection at all levels of law enforcement to address the problem of racial profiling. Department of Justice representatives have worked with Interior, Treasury, and Office of Management and Budget officials to ensure the use of standard race and ethnicity definitions and collection methods.

The executive memorandum explicitly requires the collection and reporting of data describing persons who are stopped or searched by Federal law enforcement. Data describing persons arrested by Federal law enforcement and prosecuted by U.S. attorneys will also be collected and analyzed.

Pursuant to the executive memorandum, four tasks are required of the Departments:

- (1) within 120 days of the memorandum, a proposal for a system of a data collection and implementation plan will be developed;
- (2) to the extent practicable, data sufficiently detailed to permit further analysis, will be collected on the activities of each Department's law enforcement agencies; and
- (3) prepare a report summarizing the information collected during the first year including (a) an evaluation of the field test, (b) an implementation plan for expanded data collection, and (c) recommendations for improving the fair administration of Federal law enforcement activities.
- (4) within 120 days of the memorandum, prepare a report describing training programs, policies, and practices regarding the use of race, ethnicity, and gender in law enforcement practices and recommendations for improvement.

Within 60 days of the submission of this proposal the agencies are required to begin the field test of the data collection systems. Following the first year of the field test, the Attorney General will prepare a report for the President summarizing the information collected during the first year including (a) an evaluation of the field test and (b) an implementation plan for expanded data collection. This report will be prepared by May 31, 2001. Interim reports will be prepared by the Department describing its recommendations for improving the fair administration of Federal law enforcement activities.

This document describes the proposed data collection plans for the participating Department of Justice law enforcement agencies. Within the Department of Justice, the Drug Enforcement Administration and the Immigration and Naturalization Service were determined to be the agencies that routinely engage in nonsuspect specific public encounters on a regular basis. The Federal Bureau of Investigations, U.S. Marshals Service, and the Bureau of Prisons do not engage in nonsuspect specific public encounters.

While only the Drug Enforcement Administration and the Immigration and Naturalization Service were selected for the field test of a data collection system for nonsuspect-specific public encounters, all agencies will provide data collected on arrests made, or in the case of the U.S. Attorneys, suspects prosecuted. The analysis of these data will assist in identifying racial or ethnic disparities in Federal law enforcement agencies' activities related to arrests, prosecutorial decisions, and issues relating to the sentencing of Federal offenders under the provenance of the U.S. Attorneys, *e.g.*, motions for downward departures for substantial assistance to the government.

III. Issues relating to the collection of race and ethnicity

On October 30, 1997, the Office of Management and Budget (OMB) revised the *Standards for the Classification of Federal Data on Race and Ethnicity*.¹ As part of the revised OMB standards, Federal agencies are required to collect a minimum of five categories for data describing race:

- American Indian or Alaska Native,
- Asian,
- Black or African American,
- Native Hawaiian or Other Pacific Islander, and
- White.

Additionally, two categories are required for data collected describing ethnicity:

- Hispanic or Latino, and
- Not Hispanic or Latino.

OMB encourages agencies to collect data concerning race and ethnicity by self-report using the two-question format and allowing multiple responses to the race question. For purposes of implementing the Executive Memorandum on Fairness in Law Enforcement, Federal agencies will be permitted to record a single race category by observation.

A "combined format" may be used for observer-collected data on race and ethnicity. The combined format has six categories -- the five categories of race plus "Hispanic or Latino." OMB standards encourage the collection of greater detail as long as additional categories can be aggregated into the minimum categories for race and ethnicity. However, if additional ethnic categories are collected beyond Hispanic, *infra*, the two question format is most practical.

Federal programs collecting data for use in household surveys, administrative forms and records, and other data collections must be consistent with the OMB standards as soon as possible but not later than January 1, 2003.

To ensure consistency and comparability of data across its agencies, the Department of Justice will require that agencies collect race and ethnicity data using the categories prescribed by OMB. Currently, only the Bureau of Prisons and the Drug Enforcement Administration collect race and ethnicity data using the two-question format.

A. Determining race and ethnicity: *self-report vs. observation*

At the Attorney General's June 1999 conference on *Strengthening Police-Community Relationships*, participants generally agreed that race and ethnicity data collected during a public encounter by law enforcement should be based on the observation of law enforcement officers rather than self-reports by the person contacted. Conference attendees generally agreed it would be improper for law enforcement officers to ask questions about a person's race and ethnicity

¹ 62 Fed. Reg. 58782 (1997).

during a public encounter. Such questioning may, in fact, aggravate extant perceptions of racial discrimination by law enforcement officers.

OMB standards permit the collection of data on race and ethnicity through observation in instances where it is deemed impractical to collect such data through self-reports, *e.g.*, by a medical examiner when completing a death certificate. Following the recommendation of conference participants, the Bureau of Justice Statistics (BJS) in the Department of Justice has informed OMB that the collection of data on race and ethnicity will be through observation when making nonsuspect-specific public encounters.

B. Issues relating to ethnicity

Currently, the minimum designation for ethnicity as part of the OMB *Standards for the Classification of Federal Data on Race and Ethnicity* is "Hispanic or Latino." With regard to implementing the Executive Memorandum on Fairness in Law Enforcement, additional ethnic groups should be recognized, as the agencies deem appropriate, so as to permit the monitoring of encounters involving other ethnic groups. Additional categories may include Arabic/Middle Eastern or Southeast Asian.²

IV. Agency data collection proposals

For a complete picture of Federal law enforcement activities and processing of defendants, data describing Federal law enforcement activities will be collected and analyzed describing (1) nonsuspect-specific public encounters, (2) suspects arrested by Federal law enforcement agencies, (3) defendants prosecuted in Federal courts, and (4) defendants sentenced in Federal courts. Several Federal agencies -- including the US Marshals Service, the Executive Office for the US Attorneys, the Federal Judiciary, the US Sentencing Commission, and the Bureau of Prisons -- currently provide data on the processing of Federal defendants to the Bureau of Justice Statistics as part of its Federal Justice Statistics Program.

A. Nonsuspect-specific public encounters

The executive memorandum requires that a field test of the proposed data collection system begin within 60 days of finalizing the proposal, or December 7, 1999. While many of the activities can begin on or around that date, it is unlikely that a completely automated data entry system could be designed and implemented by that date. As a result of competing Y2K issues, the DOJ agencies (and in the case of the Immigration and Naturalization Service, the U.S. Customs Service) are not expected to have automated systems in place until March 31, 2000. Until automated systems are in place, data collection will be conducted manually.³

1. Drug Enforcement Administration

Despite intervening Y2K priorities, the Drug Enforcement Administration has proposed to implement interim procedures to collect information on nonsuspect-specific public encounters. As with its current procedures relating to arrest data, data will be collected by special agents in hard copy. Data collection forms will be forwarded by each participating field office to DEA Headquarters in Arlington, VA on a regular basis and keypunched by DEA data entry staff. Following the design and implementation of modifications to its Divisional Enforcement Activity Log system, data entry will be completed in each participating field office. Hard copies of the data collection forms will continue to be forwarded to Arlington for archiving and quality control.

² OMB has not promulgated standards for identifying ethnic groups beyond Hispanic. Some of the agencies have expressed concern regarding the absence of defining criteria for other ethnic groups and, therefore, are reluctant to expand the collection of data to additional ethnic categories.

³ The U.S. Customs Service maintains the Interagency Border Inspection System used by INS. According to INS, any changes to this system will need to be accomplished by the U.S. Customs Service.

As part of its *Operation Jetway* drug interdiction program, DEA special agents routinely make pedestrian stops in airports, train and bus stations, and parcel facilities. The Drug Enforcement Administration has identified a set of factors it considers when approaching an individual suspected of transporting controlled substances. Searches of persons encountered may be conducted of those stopped.

The Drug Enforcement Administration is proposing at least six and up to nine *Operation Jetway* sites for the field test: Detroit Metropolitan Airport, Newark International Airport, Chicago-O'Hare International Airport, George Bush Intercontinental Airport (Houston), Miami International Airport, Charleston, SC bus station, Cleveland, OH train station, Albuquerque, NM train station, and Sacramento, CA bus station. The selection of such varied sites will provide for the monitoring of people using different modes of transportation under the observation of DEA special agents. BJS will analyze the data collected by DEA.

To determine whether race and ethnicity are used by DEA agents as criteria for initiating contact, an independent study of the demographic characteristics of persons using those transportation terminals will eventually be needed. Certain modes of transportation and transportation terminals in certain areas may be used more frequently by persons of particular racial or ethnic groups. Therefore, it is important to determine the demographic composition of the population observed by DEA special agents as part of *Operation Jetway*.

BJS is pursuing a variety of research and monitoring techniques available to help estimate the demographic composition of the total population under consideration. This is necessary to determine whether law enforcement disproportionately encounters a particular race or ethnic group in non-suspect stops.

2. Immigration and Naturalization Service

The field test by the Immigration and Naturalization Service is complicated by three factors: (1) the data systems used by INS are developed and maintained by the U.S. Customs Service; (2) INS is statutorily required to process passengers arriving into the United States by plane within 45 minutes of arrival;⁴ and (3) the volume of entrants processed by INS – more than 450 million primary inspections are conducted annually – would make any data collection involving the population of those entering impractical.

According to the Department of Treasury, it is unlikely that the Interagency Border Inspection System (IBIS) can be modified to incorporate changes required of this effort before the end of the calendar year. Customs Service resources are committed to resolving Y2K issues before any new applications can be developed or existing applications modified.

All persons entering the United States are interviewed by INS inspections officers at land border crossings, seaports, and airports. (At some land borders, INS and Customs inspectors share duties.) The Immigration and Naturalization Service has identified a set of factors its agents consider when making secondary referrals. Additionally, INS Border Patrol agents routinely patrol areas near land borders for persons illegally crossing into the United States and INS investigators routinely investigate employers to determine whether they employ illegal aliens. Investigations of employers are initiated following examination of employment and tax records rather than onsite inspections. A review of case files will be conducted to determine at which point in the process race, ethnicity, or

⁴ 8 U.S.C. § 1356(g).

gender becomes known and whether that knowledge has an impact on how cases are handled by INS. The Department is also considering whether additional data collection for worksite enforcement is appropriate and practicable.

To determine the demographic characteristics of those entering the United States, the collection of race and ethnicity data on a statistical sample of those entering the United States would be most practical. Samples could be drawn from the INS's Advance Passenger Information System. Full data collection would be conducted on those persons referred for secondary inspection.

The Immigration and Naturalization Service is proposing ports of entry for the field test including John F. Kennedy International Airport, George Bush Intercontinental Airport (Houston), and Seattle/Tacoma Airport. In addition, Border Patrol agents conducting "roving patrols" stationed at the El Cajon Station (near San Diego, CA), Yuma Station (near Yuma, AZ), and El Paso Station (near El Paso, TX) will also participate in the field test. A fixed check-point in the Southwest United States and a land-border crossing along the U.S.-Mexican border (Del Rio, Texas) will also be included.

It is anticipated that the U.S. Customs Service will also propose John F. Kennedy Airport as a site for its field test. Accordingly, the collection of data on the enforcement activities of the Drug Enforcement Administration, the Immigration and Naturalization Service, and the U.S. Customs Service at the same airports (*e.g.*, JFK Airport: INS and Customs; Houston: DEA and INS) will permit comprehensive monitoring of the law enforcement activities relating to persons using a selected ports of entry.

The Immigration and Naturalization Service submitted a proposal describing the scope of its activities relating to the Executive Memorandum (*See*, Attachment 1)

3. Data elements to be collected

A core set of data elements is proposed for the participating law enforcement agencies to collect on each nonsuspect-specific public encounter or, in the case of the Immigration and Naturalization Service, on each referral for secondary inspection. Information describing demographic characteristics such as gender, race, ethnicity, national origin, and date of birth will be based on the agents' observation of the person encountered or official documents, *e.g.*, drivers' license and passports, where available. The minimum data elements that will be collected are:

- **Date of the encounter:** Month, day, and year of the encounter.
- **Time of the contact (start):** Time of day the contact was initiated.
- **Gender:** The person's observed gender – Male or Female.
- **Race and Ethnicity:** Race and ethnicity will be collected in accordance with the OMB Standards for the Classification of Federal data on Race and Ethnicity (*See*, attachment 2).
- **National origin:** National origin will be collected for all encounters at land border crossings, sea ports, International airports, and roving patrols by INS Border Patrol Agents. National origin will be based on the agents' review of travel documents including passports and visas. The collection of data on national origin will serve as a supplement to data collected on the ethnicity.
- **Location of contact:** General information describing the location of the encounter such as the name of the border crossing, seaport, airport, train or bus station, or street address. For encounters in airports, information identifying the terminal (domestic, international (arrivals or departures)) will also be collected.
- **Suspected criminal activity:** The illegal activity for which the person is suspected. NCIC codes describing criminal activity will be used (*See*, attachment 3).

- **Reason(s) for contact:** Any information describing the reasons the agent initiated contact with the person. For INS inspections, only the reasons the person was referred to secondary inspection will be recorded, since primary inspection is required of all persons attempting entry into the United States.
- **External sources of information on the person contacted:** Any external sources of information regarding potential illegal activity by the person will be recorded.
- **Law enforcement action taken:** Actions taken by agents in response to the initial encounter will be recorded. Possible actions by agents include: citation, consent searches, warrantless searches, temporary detention, arrest, and voluntary departure (INS only).
- **Time of contact (end):** Time of day the contact was concluded.

The agencies may collect additional data as they deem appropriate. While the Executive Memorandum prohibits the collection of information identifiable to an individual (both the individual encountered and the law enforcement officer making the contact), if this information is currently collected by the agencies for administrative purposes, the agencies are not asked to halt the collection of this information. However, for the purposes of tasks associated with the Executive Memorandum, this information will not be included in any data files forwarded to the Bureau of Justice Statistics for analysis.

B. Arrest data

Currently, each of the DOJ law enforcement agencies collects information describing persons arrested. As part of its tasks related to the executive Memorandum, the Bureau of Justice Statistics reviewed each agency's data collection system to determine the extent to which data describing the arrestee's race, ethnicity, and gender was collected and whether those data elements were collected in a manner consistent with the OMB *Standards for the Classification of Federal data on Race and Ethnicity*.

The Bureau of Justice Statistics plans to incorporate Federal arrest data into its ongoing Federal Justice Statistics Program. Through its Federal Justice Statistics Program, the Bureau of Justice Statistics currently compiles Federal criminal case processing data from the U.S. Marshals Service, the Executive Office for U.S. Attorneys, the Administrative Office of the U.S. Courts, the U.S. Sentencing Commission, and the Bureau of Prisons. By incorporating arrest data into an existing program, BJS can ensure that these data are regularly and systematically analyzed and reported. Arrest data can be used to monitor the racial and ethnic composition of persons at each stage of the Federal criminal justice system.

1. U.S. Marshals Service.

The U.S. Marshals Service is a central repository for information on persons arrested and booked by Federal law enforcement agencies for Federal offenses. During fiscal year 1998, the U.S. Marshals Service processed 106,180 arrestees (See, attachment 4). Of these, the U.S. Marshals arrested 29,024, or 27% of all Federal arrestees.

The U.S. Marshals Service Prisoner Tracking System does not comply with the OMB *Standards for the Classification of Federal data on Race and Ethnicity*. Currently, the only racial or ethnic categories collected by the Marshals Service are: *White, Black, Asian, Indian, and Other*. For the Marshals Service to meet the minimum requirements of the OMB standards, the race/ethnicity data element would need to be expanded to include *Hispanic and Native Hawaiian or Other Pacific Islander*.

2. Drug Enforcement Administration.

The Drug Enforcement Administration (DEA) collects information on all persons arrested by DEA special agents regardless of whether the person is prosecuted in Federal, State, or foreign courts. The court of jurisdiction is identified. During fiscal year 1998, DEA special agents arrested more than 30,000 persons.

The Drug Enforcement Administration Defendant Statistical System and Division Enforcement Activity Log do not comply with the OMB *Standards for the Classification of Federal data on Race and Ethnicity*. The DEA systems currently lacks a separate racial group for *Native Hawaiian or Other Pacific Islander*. These racial groups are collected as part of the *Asian* category. For DEA to comply with the OMB standards, the current category *Asian-Pacific Islander* will need to be disaggregated into *Asian* and *Native Hawaiian or Other Pacific Islander*.

3. Federal Bureau of Investigation.

The Federal Bureau of Investigation (FBI) collects information on all persons arrested by FBI special agents regardless of whether the person is prosecuted in Federal, State, or foreign courts. During fiscal year 1998, FBI special agents arrested approximately 12,000 persons.

As part of its Uniform Crime Reporting and National Incident Based Reporting System programs, the FBI is currently reviewing its compliance with the OMB standards.

4. Bureau of Prisons.

The Bureau of Prisons collects information on all persons under its jurisdiction, *i.e.*, pretrial detainees in selected metropolitan areas, sentenced offenders, and certain other long-term detainees. Bureau of Prisons correctional officers make few arrests. As of December 31, 1998, 123,041 persons – about 90% of whom had been convicted – were under the jurisdiction of the Bureau of Prisons.

The Bureau of Prisons SENTRY data system does not comply with the OMB Standards for the Classification of Federal data on Race and Ethnicity. The BOP system currently lacks a separate racial group for *Native Hawaiian or Other Pacific Islander*. These racial groups are collected as part of the *Asian-Pacific Islander* category. For BOP to comply with the OMB standards, the current category *Asian-Pacific Islander* will need to be disaggregated into *Asian* and *Native Hawaiian or Other Pacific Islander*.

5. Immigration and Naturalization Service.

The Immigration and Naturalization Service collects information on all persons entering the United States, all persons apprehended by INS law enforcement for illegally entering or remaining in the United States, and all persons subject to removal from the United States. INS annually makes approximately 450 million primary inspections; 8 million secondary inspections and 1.2 million arrests.

Some of the data systems maintained by INS, *e.g.*, IBIS, RIPS, INTEX, currently do not collect information describing the race and ethnicity of the individual encountered. While the ENFORCE data system does include this information, ENFORCE does not comply with the OMB Standards for the Classification of Federal data on Race and Ethnicity. The ENFORCE system currently lacks a separate racial group for *Native Hawaiian or Other Pacific Islander*. These racial groups are collected as part of the *Asian-Pacific Islander* category. For ENFORCE to comply with the OMB standards, the current category *Asian-*

Pacific Islander will need to be disaggregated into *Asian* and *Native Hawaiian or Other Pacific Islander*.

C. Prosecutions in Federal court

Currently the Executive Office for U.S. Attorneys does not collect demographic information on persons investigated or prosecuted by U.S. Attorneys. Demographic Information on persons arraigned on Federal charges is available from the Federal judiciary.⁵

D. Sentencing of convicted Federal defendants

The Executive Office for U.S. Attorneys does not collect demographic information on persons convicted and sentenced in the Federal courts. Demographic information on persons sentenced in the Federal courts is available from the U.S. Sentencing Commission.⁵

V. Coordination with the Departments of the Interior and the Treasury

A. Department of the Interior

The Department of the Interior has submitted a data collection proposal. (See, Attachment 5)

The Department of the Interior employs sworn law enforcement officers in five different agencies: Bureau of Indian Affairs, Bureau of Land Management, Bureau of Reclamation, National Park Service, and the U.S. Fish and Wildlife Service. Officers in many of these agencies do not have general law enforcement authority, seldom have regular contact with the public, and make few arrests. The National Park Service – both U.S. Park Police and Park Rangers – was the only agency identified by the Department of Interior as having regular contact with the public and making a substantial number of arrests.

The Department of the Interior has agreed to collect data in the manner prescribed by the Department of Justice. The data collection system will be field tested in 10 sites:

- Lake Mead National Recreation Area (Nevada and Arizona)
- Yosemite National Park (California)
- Grand Canyon National Park (Arizona)
- Glen Canyon National Recreation Area (Arizona and Utah)
- National Expansion Memorial (Missouri)
- Indiana Dunes National Lake Shore (Indiana)
- Natchez Trace Parkway (Mississippi and Tennessee)
- Blue Ridge Parkway (Virginia and North Carolina)
- Valley Forge National Historical Park (Pennsylvania)
- Delaware Water Gap National Recreation Area (Pennsylvania and New Jersey)
- Baltimore Washington Parkway (Washington DC and Maryland)

Data collected by the Department of the Interior will be analyzed by the Bureau of Justice Statistics and included in the report to the President prepared by the Attorney General.

B. Department of the Treasury

The Department of the Treasury is submitting a data collection proposal under separate cover.

⁵ These data are routinely obtained by the Bureau of Justice Statistics as part of its Federal Justice Statistics Program.

The Department of the Treasury employs law enforcement officers within the Bureau of Alcohol, Tobacco and Firearms, Internal Revenue Service, U.S. Customs Service, and U.S. Secret Service. The uniformed division of the Secret Service and the U.S. Customs Service were the two agencies identified by the Department of the Treasury as having regular contact with the public and making a substantial number of arrests resulting from that contact.

The Department of the Treasury has agreed to follow the general data collection standards identified by the Department of Justice -- particularly as they relate to the collection of data on race and ethnicity. Treasury will field test their data collection system in Washington DC (for the uniformed division of Secret Service) and at Chicago O'Hare International, JFK International, Newark International, Miami International, and Los Angeles International airports (for the U.S. Customs Service).

The Department of the Treasury will separately analyze and report on data collected as part of the field test. This analysis will be included in the report from the Attorney General to the President.

Attachment 1
INS Proposal

Available in hardcopy only at: *askbjs@ojp.usdoj.gov*

Attachment 2
OMB Standards

Available at: <http://www.whitehouse.gov/omb/fedreg/ombdir15.html>

Attachment 3
NCIC Criminal offense codes

Available in hardcopy only at: *askbjs@ojp.usdoj.gov*

Attachment 4

Arrests for Federal offense, by agency making the arrest, 1998			
Agency	Number	Percent	
Total	106,180	100	%
Department of Agriculture	266	0.3	
Department of Defense	286	0.3	
Department of Interior	931	0.9	
Bureau of Indian Affairs	159	0.2	
U.S. Park Police	772	0.7	
Department of Justice	77,622	73.1	
Drug Enforcement Administration	11,251	10.6	
Federal Bureau of Investigation	11,914	11.2	
Immigration and Naturalization Service	25,296	23.8	
U.S. Marshals Service	29,024	27.3	
Other	37	0.0	
Department of State	464	0.4	
Department of Treasury	11,501	10.8	
Bureau of Alcohol, Tobacco, and Firearms	2,076	2.0	
Internal Revenue Service	844	0.8	
Secret Service	1,931	1.8	
U.S. Customs Service	6,650	6.3	
Federal Judiciary	774	0.7	
U.S. Postal Service	1,025	1.0	
Other	13,311	12.5	
State and local agencies	3,283	3.1	
Task forces	67	0.1	
Self-report	7,977	7.5	
Other	1,984	1.9	
Note: Statistics do not include persons arrested by Federal law enforcement agencies who were prosecuted in State, local, or foreign courts.			
Data source: U.S. Marshals Service, Prisoner Tracking System.			

Attachment 5
DOI Proposal

Available in hardcopy only at: *askbjs@ojp.usdoj.gov*